UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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PROGENICS PHARMACEUTICALS, INC.,

Plaintiff,

v. 14 MISC 245(RA)

IMS CONSULTING GROUP,

Defendant.

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New York, N.Y.
August 13, 2014
3:00 p.m.

Before:

HON. RONNIE ABRAMS,

District Judge

APPEARANCES

MARC J. GOLDSTEIN
Attorney for Plaintiff

PILLSBURY WINTHROP SHAW PITTMAN, LLP
Attorneys for Defendant
BY: KENNETH W. TABER
ANDREW KIM

GREENBERG TRAURIG
Attorney for Non-Party ONO Pharmaceutical
BY: LORING I. FENTON

(In open court; case called)

THE DEPUTY CLERK: Counsel please state your name for the record.

MR. GOLDSTEIN: Marc Goldstein for Progenics Pharmaceuticals.

THE COURT: Good afternoon.

MR. TABER: Your Honor, Ken Taber and Andrew Kim for IMS Consulting Group.

THE COURT: Good afternoon.

MR. FENTON: Good afternoon, your Honor. Loring Fenton for non party Ono Pharmaceutical.

THE COURT: I received your submissions and I am happy to hear you out.

Do you want to start, Mr. Goldstein?

MR. GOLDSTEIN: I will be happy to start, your Honor.

THE COURT: Sure.

MR. GOLDSTEIN: I would like to jump right into the issue of your Honor's power to enforce the subpoena. There is a subsidiary issue which isn't very developed of the arbitrator's power to issue the subpoena, but I think this is about your power to enforcements. So I would like to go right to the language of Section 7 of the Arbitration Act concerning enforcement power and the relevant language says that the court may compel the attendants of such person or persons before said arbitrator or arbitrators (ellipsis) in the same manner

provided by law for securing the attendance of witnesses in the Courts of the United States.

Now, we have this issue about 30(b)(6) and I want to jump right into it because I can imagine it occurred to your Honor in reading what Judge Wesley wrote in the Life Receivables decision Section 7 is a statute that dates from 1925. It is 13 years older than the Federal Rules. It dates from a time when there was no such thing as a non-party subpoena for documents only and no such thing as a deposition for prehearing discovery. Judge Wesley in his opinion pointed that out as support for reading the plain meaning of the language that said the witness has to be called to appear before in the presence of one or more of the arbitrators as the subpoena provides. Of course that is not to say that depositions were entirely unheard of before the Federal Rules, and I am going to refer the Court to an article which we discovered today and I sent it to counsel.

It is in the Yale Digital Commons, the Digital Commons website, www.DigitalCommons.Law.Yale.EDU. The author's name is Siwller, and the title of the article is The Origins of the Oral Deposition in Federal Rules. So I was instructed because it took us back to what was deposition practice in the Federal Rules and the judiciary law such as it was before we had the Federal Rules, which is to say at the time the FAA was enacted. It was interesting to read that because there was a provision

by rule on the equity side. It was Equity Rule 47 for depositions in lieu of trial testimony when authorized by statute or for good cause shown and there were two separate statutes in 28, U.S.C. -- I think it was -- 638 and 639 and you will see in the footnote of that article that provided for depositions to perpetuate trial testimony and they had Latin terms, *i bene esse*, which most of us are familiar with from either law school or some early part of our careers, and the other which is called *dedimus potestatem,* which was more or less when the witness was about to flee the country or become unavailable other than for some unpredictable period of time.

The article also says that those provisions apply to non-parties. Sometimes those proceedings took place before masters who supervised the examination. I point out the masters provision because it is interesting when one rereads the text of Section 7 carefully, the witness fee to be paid on service of the arbitral subpoena is not the fee payable to a witness to appear to testify at the trial before your Honor. It is the fee associated with an appearance before a master from way back when in 1925. So there is some good historical support that the framers of Section 7 back in 1925 had in mind not just the arbitration hearing on the merits as an analogue to a trial in the federal court but a special arbitration hearing before fewer than all the arbitrators -- and that is what we have here, a plan at the moment, an agreement between

Mr. Fenton and myself that one arbitrator will attend. It is an analogue to a proceeding under federal equity rules as they were and 28 provisions as they were for depositions for the perpetuation of testimony that would be later used at the trial.

Now, you would still like to know I assume how 30(b)(6) gets into this discussion and as 30(b)(6) is clearly a Federal Rules provision post-1938 and here is why: There are two particular sections of Section 7 that are not frozen in time, not frozen and to be read according to what was in judicial practice in 1925. That is because those provisions cross-referenced law and rules and thus are properly read to reference those laws and rules as they might be changed. We started out by reading in the same manner provided by law for securing the attendance of witnesses. Obviously Congress had in mind not only how attendance was secured in 1925 but as it might be secured in the future when those laws might be amended by Congress to update practice in the federal courts.

That is what happened. Congress updated practice in 1938 and they created Rule 30(b)(6) and 30(b)(6) then became one of the methods provided by law for securing attendance of witnesses in the courts of the United States and that we pointed out in the brief and so I don't need to belabor it that the language in the statute talks about securing the attendance of witnesses in courts. It doesn't say securing the attendants

of non party witnesses at trial for trial testimony in the courts. Perpetuation of testimony rather under Rule 30(b)(6) or in this one arbitration hearing we have on the calendar for August 25th is the taking of testimony. So there is an analogue directly to Rule 30(b)(6).

Now, I only want to pause briefly on the question of arbitral power. That is the lay of the land in terms of judicial power. In terms of arbitrator I pause briefly only to say that we have what amounts to a 30(b)(6) type of subpoena to a corporate witness, and in our brief we cited the Dictionary Act. I didn't know there was Dictionary Act. It says right there in 1, U.S., 1 as I quoted it that unless the context indicates otherwise, a person in a statute of the United States means a natural person and corporation, partnership, entity, etc., etc. So there is no question that person or persons as used in Section 7 of the Federal Arbitration Act includes a corporation. Even if the subpoena had not directed the corporation to designate, a corporation properly served in the arbitral subpoena would have to designate.

That really brings us then to the main question of the day, your Honor, because I don't think the question is whether you have the power to enforce the subpoena. I think it is clear that you do. I think it is clear that 30(b)(6) is an appropriate analogue. I think the submission made by our adversary Mr. Taber that Rule 45 doesn't bring into play

30(b)(6) was inconclusive as his brief and mine both recognized. We cited a case in which it was so recognized. But I think that doesn't matter because we're not only talking about an analogue to bring a witness in for trial. We're talking about an analogue perpetuating testimony for use of trial. So 30(b)(6) is a perfectly good analogue.

So it really brings us to the question of burden. You have Judge Scheindlin's opinion. We've quoted it. We discussed it. I only want to point out that that opinion has popularity this week. In a case two recent have been cited yesterday because it was cited by a federal district judge in Nevada on Monday.

THE COURT: Was that 30(b)(6) case?

MR. GOLDSTEIN: Yes. The case is NML Capital LTD v. the Republic of Argentina, 2014 WL 3898021 at *10, and the discussion at *10 quotes specifically Judge Scheindlin's discussion of the obligation to educate a witness in the jurisdiction to give testimony. They relied on that in enforcing the subpoena to require the out-of-state persons with knowledge to educate a witness within the body who could testify in response to the subpoena. So Judge Scheindlin got some approval there.

So with that I just want to go to the question of burden directly. I think the question of burden, whether it is undue or not, can fairly be stated this way: Is the cost and

effort involved to educate a New York witness so great that the cost is prohibited, that is to say IMS is de facto compelled to make the witness in Japan appear by video conference to testify. That is the back door argument they make. I can conceive of the back door argument making sense that the cost to educate the New York witness is so prohibitive that there is a de facto compulsion to make the witness in Japan a witness.

Now, the answer to that question, whether there is that level of compulsion, is no for several reasons. First, IMS has a consulting agreement with Ono, the respondent. IMS was paid for the first report that was made as the alleged basis to terminate the contract. IMS was paid for the second report in May of this year that was generated during the arbitration for use as evidence. It is inferrable that IMS will be paid by Ono for its time spent as a witness. It is a further element of their consulting engagement.

Second, IMS has Ono's help to get ready. Their client Ono, in Japan, plus Ono's counsel, in the New York and Japan, they are in privity. That is an extraordinary level of support to facilitate the New York witness getting ready.

Third, we have given fairly precise directions on the issues we want to cover in the oral testimony. If I stray, if we stray into details that go well beyond that and the witness says, I didn't prepare to answer that question, then the witness doesn't testify to that matter. Then it is up to the

arbitrators to decide if we ask for an adverse inference whether the witness reasonably should have been ready to answer that question. So Mr. Ashman's declaration and counsel's argument about how complicated the report was and how involved was IMS's field work for their labor of work is really one of those classical logical fallacies of arguing a parade of horribles in the extreme. It is really never going to come to pass. We have specified the subjects for the deposition in a narrow and reasonable way. If the witness fails to get educated for a question that might go beyond the bounds of that, they would have a good argument that we really didn't need to prepare for that and we didn't and no adverse inference could be drawn.

Now, I want to finish by stating the obvious that the test is not just burden but undue burden. An undue burden relates not only to the factors that I have just discussed but it takes into account the probative value of the evidence and the proponent's need for the evidence. IMS has nearly nothing to say on those points because there really is nothing for them to say. Their two reports are at the heart of the arbitration. All of Ono's witnesses and Ono's expert economists, they all testify about what IMS did and Ono's people in their written witness statements -- two rounds of it now -- testify about what they talked about with IMS in meetings before and during and after the reports.

THE COURT: The witnesses are in Japan.

MR. GOLDSTEIN: Those witnesses are in Japan and they will come to be cross-examined. Progenics is prejudiced without the testimony especially because as your Honor knows hearsay goes into the record so automatically in the arbitration so we already have a written record filled with hearsay testimony about what IMS allegedly said and why IMS allegedly did things as they did. So we need this testimony for the arbitration to be a fair arbitration. That is an important part of the balancing when you consider whether there is an undue burden.

Thank you, your Honor, for your attention.

THE COURT: Thank you.

MR. TABER: Thank you, your Honor. I have six points I would like to make. I will try to make each of them very quickly. First point: Mr. Goldstein has now had three briefs before your Honor in which to give the Court one case, just one case, in which what he is asking for has been done by a court anywhere. What he is asking for is the use of Rule 30(b)(6) to compel us to educate a witness who doesn't know anything about the subject matter at hand to testify at an arbitral hearing here in New York when everyone admits that the people who know about the subject matter are beyond the 100-mile limit of the subpoena power of this court and of the arbitral tribunal. There isn't a single case he can point to where that has ever

been done in the 75 years of Rule 30(b)(6) being in play. The reason why, your Honor, is that that device in that context makes no sense. What has been said in many cases, and we cite them in our papers, is that the arbitral subpoena range is 100 miles to find knowledgeable witnesses who can testify about things about which they know. No case has said, And if there are no knowledgeable witnesses, you must educate them. To the contrary, your Honor, we cite two cases. One from the D.C. District Court in particular involving BBC, which had a news bureau in Washington D.C. but the people who new about the issue that was before the Court, which was the notion of out-takes from a BBC broadcasting were all in London, and there was -- this was in the setting of just a deposition, not even a trial setting. There was an attempt to compel the presentation of a witness within the 100 miles and BBC said, No, we have no such witness who has that knowledge, and court agreed and quashed the subpoena.

THE COURT: Let me just ask you a basic question. I understand that the arbitrator did not order anyone in Japan to participate by way of video conference, but do you think that the arbitrator even had the power to do that?

MR. TABER: I don't. I don't. I think that the arbitrator had the power to have 100 miles' worth of a radius to find witnesses and the arbitrators appropriately exercised that power and clarified when we submitted our objection that

that was all they intended to do. They didn't see their power as any broader to reach witnesses in Japan. Now, there may be some procedure by which the panel could get on an airplane and go to Japan and utilize the comity of the Japanese court system in order to have the equivalent of a subpoena issued in Japan in U.S. Court proceedings. That hasn't happened here. I don't know if it could have happened here frankly, but there is no doubt it hasn't happened here.

We all know in any litigation there are sometimes witnesses who are beyond the reach of the Court and cannot be compelled to come to court to testify. That is this case. There is no witness at IMS in New York who knows anything about this particular project. 750 hours were spent on the project. Every one of those hours was spent by someone in Tokyo. Nobody in New York knows about the project.

Let Me if I may go to my second point.

THE COURT: Absolutely.

MR. TABER: Mr. Goldstein tells us in his submission to the Court yesterday that it shouldn't matter to this Court whether the testimony at issue here is going to be worthless testimony or not. That is an issue for the arbitrator he says and I respectfully disagree. The standard that is applicable here is whether there is a significant need for the testimony in question. I am assuming that he gets over his 30(b)(6) problem. I don't think he does, but let's assume he does. The

test then is whether there is a significant need for the testimony.

THE COURT: Are you denying that there is a significant need for the testimony of a witness in Japan, or is your argument just that having a witness who is educated on an impromptu basis wouldn't provide the useful testimony that Progenics is seeking?

MR. TABER: The second, your Honor. No, there are clearly witnesses in Japan who have information that would appear from everything we know to be relevant to the dispute between these parties. The educated witness in the U.S. who will no nothing other than hearsay from conversations with other people and who is not in a position because IMS is not a party to give admissions or make admissions that would overcome the hearsay rule is in effect giving testimony that is no more valuable than if we took someone off the street and put them in a room for a couple days and have them talk to someone in Japan about the project and then brought them into testify.

THE COURT: Well, IMS could produce someone with useful information either by way of video conference or have someone from Japan come, but IMS is unwilling to do so.

MR. TABER: We're unwilling to do so because we're not obligated to do so, your Honor. This is not our fight. We're a non-party. The reach of the subpoena is 100 miles. The arbitrators have already said, No, we don't want a video

conference from Japan. That is off the table as far as arbitrators are concerned.

THE COURT: Have they specifically said that as to video conference?

MR. TABER: I will read you exactly what their words were, your Honor. What they said is -- they don't use the word "video conference."

MR. GOLDSTEIN: The subpoena uses the word video conference.

MR. TABER: What they say is, For the record it was not the intention of the tribunal to require the appearance of a witness in Japan. If a witness is participating by video conference in a U.S. proceeding, the witness is appearing in Japan at one end of the video conference link. I believe they say quite clearly they don't want that and so does Mr. Goldstein frankly. In his submission, his first submission to the Court, he says we're not asking for a video conference in Japan, and we understand that the arbitrators said we can't have that. That was something that I suppose he must have raised at some earlier stage. I don't know. We weren't there. It is clear from his papers that he believes he is not entitled to it and we concur.

THE COURT: I agree. I am not being asked to decide whether a witness in Japan could be compelled to testify by video. That is not the issue I am deciding today in any event

so please proceed.

MR. TABER: Thank you, your Honor.

The third point I want to make is with respect to Mr. Goldstein's argument in his paper that the way we can do this is in effect with a phone-a-friend, have someone in New York who has necessary phone somebody in Japan to find out whatever the information is in order to be able to testify. My only comment there, your Honor, is it just can't work in the trial setting. The notion you are going to ask a question of a witness who isn't going to know the answer, you are going to take a break while the witness calls someone in Japan and ask the question is ludicrous. I don't think that that is what Mr. Goldstein meant to suggest. I point it out only because it underscores that the procedure he is asking for here unprecedented as it is is also completely impractical in the real world.

Fourth point, your Honor. Mr. Goldstein says there is no undue burden here, that this is just business and the Court should overlook that. Respectfully, your Honor, it is not just business to say to someone who has never touched a project, never worked on that project, doesn't know the Japanese health care system, doesn't know the Japanese language to come in an educate themselves in some fashion to answer Mr. Goldstein's question which are wide-ranging questions and he lays them out in his papers. He is not shy.

THE COURT: The part where he says in his papers if you want to avoid that burden, produce someone by video conference from Japan.

MR. TABER: He does say that in his papers, your Honor, but he is not entitled to that and I believe he cannot foist upon us an undue burden and say, Of course there is an answer for your undue burden, which is to give me something you know and I know I am not entitled to. It doesn't work that way. There is an undue burden because what he is proposing which is the only thing he is allowed by the panel to propose is the use of a witness in New York who knows by everyone's agreement nothing about the subject of the testimony they are being called on to give. That is, I believe, your Honor, the paradigm of an undue burden, to have to take a human being who knows nothing about something and turn them into someone who is going to testify live under oath. To say, well, yeah, you can avoid that by having a witness in Japan is not an answer either the tribunal thinks is appropriate or Mr. Goldstein believes he is entitled to because he is not.

The fifth point was to talk about the video conferencing and I think we covered that more than adequately.

The last point relates to the case citing Judge Scheindlin's case for 30(b)(6), which was just apparently handed down within the last couple days. That is a case involving Argentina decided by the District of Nevada. All

that case does, your Honor, is it recites the Rule 30(b)(6) standard. It's a deposition case, not a trial case. So it is still the fact that there is nothing further on the trial side of the equation. It is not an arbitration case and so it doesn't change anything that the cases that we described in our papers established.

I would also add that in that case the only question that was put to the deposition witness or was going to be put to the deposition question was whether and why particular documents exist or don't exist. That is the kind of question that somebody can prepare for and answer on behalf of a corporation, the existence of a body of documents, whether they exist, and if they don't exist where are they in effect. That is not what Mr. Goldstein is asking for here. What he is asking for here is substantive testimony -- What did you in the study, what didn't you do in the study, why did you do it, or why didn't you do it, why didn't you do a host of other alternatives that I think you should have done. Those are all questions that can only be answered by someone who knows the Japanese health care market generally and this particular project in particular.

So, your Honor, if I could just sum up what we're dealing with is, I believe, a completely unprecedented request to use a mechanism that in 75 years has never previously been used and that would impose even if it were proper an undue

burden. If the words undue burden mean anything, they mean what Mr. Goldstein is asking this New York witness to do.

Thank you very much.

THE COURT: Thank you.

Mr. Goldstein, would you like to respond?

MR. GOLDSTEIN: Yes, your Honor.

Sometimes replies take last points first so I will take the new Nevada case first and I will read from it. This is at *10. "Rule 45(c) territorial limits place no barriers on the information that a properly served subpoena can reach. Given the unique status of a corporate person, a federal court subpoena power reaches all documents, no matter where they are located, and that are within a resident corporation's custody and control." Then it goes to the testimony inside. "Similarly, the unique status of the corporate person permits a federal court to compel a non-party resident corporation to designate a non-resident employee to 'thoroughly educate' and in forum employee to testimony on the corporation's behalf." Citing Wolves v. Bank of China, 298 F.R.D. 91, 99 and then parenthetical quote of Judge Scheindlin, "Even Hapoalim is a non-party witness and all the documents are knowledgeable persons are in Jerusalem, compliance with 30(b)(6) subpoena is not an undue burden."

THE COURT: Let me ask you how useful would it really be? This is different. Putting aside the issue of the

distinction between 30(b)(6) and an arbitral subpoena, putting that aside for a moment, how useful would it be in this case to have IMS educate a witness who wasn't involved in the study on questions raised about why did you do this in the study, why didn't you do that? Doesn't that require an expert's knowledge of the study in the Japanese health care market? It is very distinct from something about the company or what the company did.

MR. GOLDSTEIN: It does not, your Honor, because the questions are fairly pointed and they do not go to the methodology or the field work of IMS. They go to IMS's communications with Ono. As to which Ono's witnesses have testified to what they said to IMS and what IMS said to Ono. I would like to ask, Did you in fact say that to Ono in the meeting held on August 6th as Mr. X from Ono has testified. There is no difficulty in witness statement of the Ono witness being shown to the designee in New York who can discuss its content with his counterpart in Tokyo and find out. We have other rather pointed questions which are again not about the methodology.

THE COURT: In terms of he has to find out from a person in Tokyo isn't that an end run around the geographic limitations that the idea being, all right, you have to designate someone here who is going to call the person in Tokyo?

MR. GOLDSTEIN: I think Judge Scheindlin is correct in saying in effect it is not an end run around the geographic limitations because the knowledge is held by the corporation. It is only held by individuals on behalf of the corporation. The corporation is present in New York. It is jurisdictionally here and therefore it is validly served. These are devices to get at the corporation's knowledge in the best way we can. That notion of the geographic locus of the knowledge was reiterated in what was written in the very first paragraph of the judge of Nevada, Rule 45(c) territorial limits place no barriers on the information that a properly served subpoena can reach.

Judge Scheindlin's opinion elaborated on that. The corporation has the information. The employees are in different places and we cannot force the Japan employee to come here, but we can force somebody here to get the information from the Japan employee. I pointed out earlier Mr. Taber argued that the hearsay nature of what the Japan witness would say to his colleague in New York makes it either inadmissible or not useful. I disagree with that. It is hearsay in a technical sense. But if hearsay in a technical sense was applying in arbitration, all the testimony of Ono about what IMS said to them would be stricken out. But it is not being stricken out because hearsay goes in the record for what it is worth in the arbitration. So we have a significant need and

there will be significant value.

I am going to skip over the phonathon on this point, your Honor, because we were not suggesting that at all.

THE COURT: I think we just addressed that.

MR. GOLDSTEIN: The subpoena, your Honor, and Exhibit 11 says in the last sentence of page 1, Video conference facilities will be available to accommodate the appearance to give testimony of any person designated by you to testify.

THE COURT: What page?

MR. GOLDSTEIN: First page of the subpoena at Exhibit 11. First of all, we scheduled by agreement for 6:00 p.m. which is 7:00 a.m. in Tokyo in case they decided to designate a witness in Japan. That was part of the e-mail exchange among the arbitrators and Mr. Fenton and me to select a time of day that would accommodate the Japan witness if they elected to go that route and then in the last sentence says, Video conference will be available to accommodate the appearance. So, yes, the arbitrators had no intention to require anyone in Tokyo to fly here and show up here. They have no intention evidently to require that the Japanese witness be designated. They did contemplate that the designee at IMS's election to avoid burden -- to avoid the burden they are talking about of educating somebody might be to opt for the video conference.

THE COURT: They are not electing to do that.

MR. GOLDSTEIN: Right. They are not electing to do

that. They are not electing to do that and they can't be compelled to bring the Japanese witness, but they are not forced to bring the Japanese witness. They have a meaningful choice of educating a witness in a reasonable way.

THE COURT: In your view they have a meaningful choice of doing what you are requesting and educating someone not at all knowledgeable about this study to essentially answer questions about the study or to do what the arbitrator has clearly not asked them to do and they cannot be required to do, which is designate someone in Japan to participate by video conference.

MR. GOLDSTEIN: They can opt for that. That was precisely what Judge Scheindlin said. They cannot be required to do that; but the fact that they have the ability to do that as an option -- that is a less burdensome option -- is relevant to the question of undue burden. They can choose that. They have an easy route to minimize burden to nothing. The burden involved in educating a witness in a reasonable fashion as I said in the formula originally is not so overwhelming especially in a context where it is really not disputed that the people is going to be compensated for their time to get ready in a reasonable way. Your Honor is not going to direct them to read every page of the report. They will not be expected to do that. They will not be expected to know the details of the field work that was done or the survey and the

design of the survey and the interviews and the physicians. That is not what it is about. We have given you in our subpoena and in our brief a very specific definition of what we think the education involves and what we think the examination before the arbitrator involves. That is a reasonable burden all factors considered, your Honor, and that is our submission to you today.

THE COURT: Thank you.

Did you want to say one more thing, Mr. Taber?

MR. TABER: I would appreciate the opportunity, your Honor. Thank you.

Contrary to what Mr. Goldstein just indicated, the corporation, IMS, does not have the information he seeks. The information he seeks resides in the heads of the people who work on the project. The questions he wants to asks are questions like, what did you do and why did you do it, why didn't you do other things that I think you should have done, and how did you make the choices you made here.

THE COURT: Is that true? I don't mean to interrupt. Is that true? Do you really just want to ask the limited questions you asked a moment ago about communications that were made or do you really want to ask about the formulation of the study and why it was done and how it was done?

MR. GOLDSTEIN: Really the only question about the formulation of the study, your Honor, relates to the

assumptions that were evidently, and we understand, to have been imposed by Ono and therefore not the subjects of any study by IMS and that was what prices to use in sales estimates, which we understand to have been imposed by Ono and sent. We want to confirm that and we want to know why. And the second is why did you use to quantify the universe of cancer patients Statistics A rather than Statistics B, was that directed by Ono, or did you have a reason about reliability about statistics or otherwise to choose one rather than the other. The methodology of carrying out the report is not a subject of the examination, your Honor. That is why we say whether it is for the educated witness or witness in Japan, we're not asking a lot.

MR. TABER: Your Honor, I am going to read from Mr. Goldstein's own declaration that he submitted to your Honor here and what he says paragraph 21 is "Therefore, to have the chance to question IMS about why it made those assumptions is important." That is in paragraph 21. In paragraph 23 he says, We do wish to determine if IMS did certain types of analysis and for certain reasons omit that analysis from the report."He goes on to say that we want the witness "to be able to explain what was done and what were the conclusions." He then has some more specific questions but those are the broad sweeping questions that in his declaration he told your Honor and he said the same thing I believe to the tribunal he intends to ask

this witness about. We all know that when he asked the first question, there is going to be a follow-up question depending on what the answer is. Then there will be further follow-up questions, but he is talking to someone who doesn't know the answers. Because at most they have the hearsay from having questioned the people who do know the answers. That is exactly the distinction here, your Honor, that the cases focus on.

One of the cases we cited for your Honor is a case called Sara Lee Corp. v. Kraft Foods, Inc., 276 F.R.D. 500 from the Northern Strict of Illinois in 2011. The Court there draws this very distinction and says that when you are talking about topics such as, quote, the corporations official position as to, quote, corporate policies and procedures or the corporation's opinion about whether a business partner complies with the terms of contract, close quotes, that is proper Rule 30(b)(6) examination of corporate policies, corporate level decisions. But the Court goes on to say, quote, Nonparty Rule 30(b)(6) testimony is less appropriate for proving how the parties acted in a given instance, closed quote. That is what we're dealing with here.

Mr. Goldstein wants to know because he says it is important to his case how IMS acted in a particular instance, why it did what it did, why it didn't do other things that he thinks it should have done. That is where Rule 30(b)(6) is inappropriate, where educating a witness who didn't participate

in any way, shape or form in the facts is a different situation. The BBC, case, your Honor, they wanted to know information and the Court said, The information you want is known by people who are all in London. The people here in Washington D.C. are news reporters. They don't know how this particular broadcast that you are challenging was assembled, why there were out-takes not included. They don't know anything about that and to ask them about it because they happen to be within a hundred miles of this court is wrong. We're quashing the subpoena. This Court should do exactly the same.

Last point, your Honor. The case from Judge Scheindlin that Mr. Goldstein spent so much time on. The questions that she allowed to be asked of the witness from Bank Hapoalim who was to be educated were extremely narrow. They went to a single issue. Did the Israeli government give a particular instruction to the bank or not. It was a yes-no question. That is what she allowed to be answered by a witness to be educated here in New York. It wasn't a course of conduct question. It wasn't a question for 750 hours of consulting work. It was a question to a single discrete fact. That is okay for Rule 30(b)(6) depositions and maybe the argument can be made that that is okay for trial in an arbitration. But what year talking about is different in scope and in magnitude and in burden and that is why the subpoena should be quashed,

your Honor.

THE COURT: Why don't we do this: Why don't we take a brief recess.

MR. GOLDSTEIN: Your Honor, may I have one moment?

THE COURT: Sure.

MR. GOLDSTEIN: I think the arguments come down to what I say I want to ask versus what Mr. Taber insists that I really think I might ask. What I presented to your Honor was fairly narrow. If the answer to the question is: Did you study -- did you not study the price because IMS -- Ono told you not to study the price. Yes. I will ask: Did you study the price anyway? The answer to that might be no. If the answer is no, it certainly is no burden to find out.

THE COURT: You had said earlier you were going to ask why questions, which I don't think are narrow. Did Ono direct you to do this.

MR. GOLDSTEIN: One why question. Why did you select Data Point X rather than Data Point Y, period. The followup question might be: Did you study under Data Point Y as an alternative? Answer, no. Alternate answer yes. If the alternative answer is yes, the detail of it should be in documents that are going on produced. It is not going to be a subject of oral testimony. Similarly if the answer is yes, we did a price study under the alternative pricing of what they thought the price would be, it will be in documents. It is not

the subject of oral testimony. The documents can be produced. Obviously if they did a study of price, it is a highly documentary thing and they can provide it. If the answer is no, the answer is simply obtained. It doesn't take much education. We're done. That is not burdensome. I submit to your Honor that Mr. Taber is putting the parade of horribles in your mouth and trying to say this is American litigator who is not able to resist and asking questions into the weeds. I have been very specific about what our interests are and that is why it is not burdensome.

THE COURT: Thank you. We'll take a brief recess.

(Recess)

THE COURT: Having considered the parties' submissions and arguments, I'm going to deny Progenics' motion to compel compliance with the arbitral witness summons. I have not been asked to decide whether a witness in Japan could be compelled to testify by video before the arbitrators. Instead, the narrow issue before me is whether, by analogy to Rule 30(b)(6), IMS can be compelled to educate an employee in New York about a Japanese for the purpose of testifying before the arbitrators.

I don't think there is a dispute that it would be unprecedented to order a non-party to comply with an arbitration subpoena by designating a representative and educating him or her in the same manner as 30(b)(6) deponent. I find that I have no legal basis to do so here.

For Progenics' argument to succeed, I would have to find, first, that 30(b)(6) requirements apply to arbitration subpoenas and, second, that this particular subpoena is not unduly burdensome.

As the parties are aware, the enforcement of arbitration subpoenas is governed by Section 7 of the Federal Arbitration Act, which provides that the district courts shall enforce such subpoenas "in the same manner provided by law for securing the attendance of witnesses in the courts of the United States." The Act also provides that such subpoenas "shall be served in the same manner as subpoenas to appear and testify before the court." The text of the statute therefore requires courts faced with arbitration subpoenas to apply the requirements for subpoenas to testify in court. See Dynegy Midstream Servs. v. Trammochem, 451 F.3d at 94.

This understanding is reinforced by the fact that Section 7 does not authorize arbitration subpoenas for pre-hearing discovery. See Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, and Odfjell ASA v. Celanese AG, 328 F. Supp. 2d at 507.

There is no indication in the Federal Rules of Civil Procedure themselves that Rule 30(b)(6) applies to a subpoena that compels a witness to testify at trial. Although this is an open issue in the Second Circuit, and there are some district court cases to the contrary, the only circuit courts

to have addressed the issue support IMS's view of the law, and their reasoning is persuasive. See Brazos River Authority v. GE Ionics, Inc., 469 F.3d at 434 (a 5th Circuit case from 2006) and Donoghue v. Orange County., 848 F.2d at 932 (a 9th Circuit case from 1987). See also Hill v. National Railroad Passenger Corporation, 1989 WL 87621, and Dopson-Troutt v. Novartis Pharmaceutical Corporation, 295 F.R.D. at 539-40.

I recognize that the testimony of the witnesses involved in the IMS study is important to Progenics. I also recognize that, although I do believe it would be burdensome for IMS to educate a witness in New York about the study at issue, IMS could largely avoid that burden by having a witness in Japan testify by videoconference. Ultimately, though, I do not believe that I have the authority to order the specific relief Progenics requests.

MR. GOLDSTEIN: This, your Honor.

MR. TABER: Thank you very much, your Honor.

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